IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 622 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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AVDHESHKUMAR SHIVMANGAL MAHADIN - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :

MRS SHILPA R SHAH for Appellant.
MR KT DAVE, APP for Opponent.

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CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 01/02/2007

ORAL JUDGMENT

(**Per : HONOURABLE MR.JUSTICE K.A.PUJ**)

1. Challenge in this appeal filed under section 374 (2) of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 19.06.2002 rendered in Special (NDPS) Case No. 04 of 2000 by the learned Special Judge (NDPS) & Fast Track Judge, Mehsana by which the appellant – original accused No. 1 has been convicted for commission of the offences punishable under Section 20 (b) (ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentenced to suffer R.I. for ten years and

fine of Rs.1,00,000/- and in default thereof, to undergo further sentence of S.I. for one year.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under :-

3. Mr. R.S. Patel, Police Inspector, Unza Police Station was present in the police station at 16.15 hours in the evening on 18.07.2000. At that time, an unarmed head constable Sabbirkhan Nadirkhan informed that two Bhaiyas aged between 20 to 25 years from U.P. out of whom one was black having curly hair and has put on a full sleeve open shirt – sky colour up to chest and henna colour below thereto and a white pant and the other wheat coloured one has put on pink coloured with white designed full sleeve shirt and a brown coloured pant, had come to sell the opium at sugarcane press in the name of Ram Lakhan Tisu Bhaiya on the highway road and were also coming again to sell the opium on the said press

at about 4.00 to 5.00 O'clock in the evening. On receiving the said information and as raid was to be carried out at the said place, the Panchas (1) Rabari Tejabhai Karshanbhai residing at village Khodala, Tal. Konkrej, Dist. Banaskantha (2) Patel Somabhai Narayandas residing at Unjha, Sattahall and P.S.I. Shri P.S. Goswami and A.S.I. Ranjitsinh Halusinh and Head constable Sabbirkhan Nadirkhan and Vajuji Chenaji and Punaji Lalji and a police constable Subhashkumar Ranchhoddas etc. were called. All were appraised about the information. A preliminary panchnama was prepared between 16.30 to 16.45 hours in the office. Then they have started in a Govt. vehicle from the office and reached at the Unjha highway choky. The jeep was kept there. Thereafter, the persons of the raiding party got down from the Jeep and they have cordoned the place shown by the head constable Sabbirkhan and kept watch around the sugarcane press of Ramlakhan from outside on the north of the bus stand near the highway road.

4. At that time, two persons, having put on the clothes described in the information, came on the press and the head constable Sabbirkhan gave signal and immediately both the said persons were cordoned and arrested. Out of them, one person hanged one brown colour raxin bag on the shoulder. Upon asking his name and address, he stated it to be Nai Avadheshkumar s/o Shivmangal residing at village Sedgo, Tal. Maharajganj, Dist. Raibareli (U.P.). On asking the name of the other person, he stated his name to be Godia Rambahadur s/o Bhagvandin Maikuddin residing at village Sudauli, Tal. Maharajganj, Dist. Raibareli (U.P.) Both the persons were explained orally and in writing that they were doing the business of opium. As they were required to be checked in person, he could make an arrangement of calling upon a Gazetted Officer or Magistrate if they so desired. Both of them negatived and it was noted. Moreover, it was orally conveyed that they could also check the Panchas and the

Police Personnels of the raiding party. But they refused. It was noted. Nai Avadheshkumar had bag and on looking into it, slight greenish black coloured quantity was found. It was smelt and the opium smell was coming out. It was liquid lump of opium.

5. As head constable Vajuji Chenaji, of the raiding party, had the scale, upon weighing, it was 900 gms. in total. Its value could be about Rs.25,000/-. Then a sample of 100 gms of opium from the said quantity of opium was placed in a tin box of Babul Jafrani Jarda and the slips bearing signatures of the panchas and the P.I. Were put therein. The said tin box was packed with a paper cover and tied with the string. The slip bearing the signature of P.I. and the signatures of the Panchas was placed and sealed with the waxing seal of P.I. Unjha in english. The sample tin was given mark 'A'. About 100 gms. Opium was kept in the reserve sample in tin box and sealed. Reserve sample box was given mark 'B'. The remaining opium was placed in a plastic bag and slip

bearing the signatures of the Panchas and police was placed in the said plastic bag and packed and the said plastic bag was covered with a paper and tied with string. The slip bearing signatures was kept thereon and it was given mark 'C'. Thus, three samples were seized for investigation. On checking the persons of both, no other offendable article was found from the clothes put on by them. A panchnama in detail was made at about 18.45 hours.

6. Thus, both the aforesaid persons have been arrested with 900 gms. Opium valuing Rs.25,000/- and a complaint was filed against both these persons with the Unjha Police Station for taking legal action against them under Section 8 (c) read with Section 22 of the NDPS Act.

7. After filing of the complaint, the investigation was put into motion. During the course of investigation, the muddamal was sent to FSL for analysis and Investigating Officer recorded the statements and on

receipt of the report from the FSL certifying that the muddamal sent for analysis was opium and as incriminating evidence was found against the accused person, they were charge-sheeted before the learned Special Judge (NDPS) & Fast Track Judge, Mehsana for commission of the offences punishable under Section 8 (c) read with Section 22 of the NDPS Act.

8. The learned Special Judge (NDPS) & Fast Track Judge, Mehsana to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 8 (c) read with Section 22 of the NDPS Act which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Special (NDPS) Case No. 4 of 2000.

9. To prove the culpability of the accused, the prosecution has examined and relied upon the

evidence of eight witnesses, details of which are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	17	P.W. 1 - Ravindrabhai Sanabhai Patel	47 - 51
02.	28	P.W. 2 – Somabhai Narandas Patel	61 - 62
03.	30	P.W. 3 – Vajuji Jenaji	66 - 67
04.	31	P.W. 4 – Ghemarbhai Keshabhai	68
05.	33	Pravinpuri Shankarpuri Goswami	70 - 71
06.	34	Bachubharti Joitabharti Goswami	72 – 73
07.	36	Kanuji Ravaji	75
08.	38	Ahmedkhan Kadiwala	77 - 78

10.To prove the case against the appellant – accused, the prosecution has also produced and relied upon number of documents, details of which are as under:-

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
01.	1	Charge-sheet.	8
02.	2	Muddamal receipt	9
03.	13	Charge	21
04.	18	Extract from the Police Station Diary No. 14 of 2000.	52
05.	20	Complaint	54 – 56
06.	21	Seizure Memo	57
07.	22	Ravanagi Note	58 – 59
08.	29	Panchnama	63 – 65
09.	35	Muddamal registration Entry No. 111.	74

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
10.	37	Letter from F.S.L.	76
11.	40	F.S.L. Report	80 – 82
12.	41	Biological Analysis Report	83

11. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement, they denied the case of the prosecution in toto. They have stated that they have been falsely implicated in the case. However, they have neither led any evidence nor examined any witness to support their defence.

12. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana held that contraband article Opium was recovered from the appellant – orig. accused No. 1 and the prosecution

has been able to establish that the complicity of the accused No. 1 for commission of the offences with which he was charged, has been proved beyond reasonable doubt, and therefore, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana recorded the order of conviction and sentence against him to which reference is made in earlier paragraph of this judgment, giving rise to instant appeal at the instance of the original accused No. 1. The learned Special Judge (NDPS) & Fast Track Judge, Mehsana has, however, acquitted the original accused No. 2 from the charges levelled against him as the prosecution has failed to establish the charges against him beyond reasonable doubt.

13. Mrs. Shilpa R. Shah, learned advocate appearing for the appellant – orig. accused No. 1 has submitted that she does not want to challenge the impugned judgment and order passed by the learned Special Judge (NDPS) & Fast Track Judge, Mehsana so far as conviction of the accused for commission of the offences punishable under Section 18 and not under

Section 22 of the NDPS Act is concerned. She has submitted that the charge was wrongly framed under Section 22 of the NDPS Act as no offence was committed under Section 22 of the NDPS Act. As per the prosecution case, the accused was found with Opium which is not a psychotropic substance within the meaning of Section 22. Therefore, while convicting the appellant – orig. accused No. 1, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has considered the case of the appellant under Section 20 (b) (ii) instead of Section 22 of the Act. Even, this is also not correct as the real section which is applicable in the present case is Section 18 of the Act.

14. So far as sentence awarded for commission of offence under section 18 of the NDPS Act is concerned, according to her, it is harsh in view of the fact that the contraband article Opium recovered from the appellant – orig. accused No. 1 was only 528 grams, which is less than commercial quantity. In spite of that, the learned Special Judge (NDPS) &

Fast Track Judge, Mehsana has imposed the minimum sentence on the accused by considering the unamended Provisions prevailing prior to 02.10.2001. She has submitted that the accused is in jail since the date of his arrest i.e., 18.07.2000 and thus he has undergone imprisonment for more than six and half years as on today. She has further submitted that taking a liberal view, the imprisonment already undergone by the accused may be treated as substantive sentence for the offence proved against him. She has, therefore, submitted that the sentence of ten years of RI and fine of Rs.1,00,000 imposed on the appellant - accused No. 1 may be modified by holding that the period of imprisonment already undergone by the appellant - accused No. 1 may be treated as substantive sentence and accordingly the appeal may be allowed to this extent.

15. Per contra, Mr. K.T. Dave, learned Additional Public Prosecutor, has fairly conceded that so far as charge framed under Section 22 and altered in Section 20

(b) (ii) is concerned, the same is not correct as neither of these sections is applicable. The appellant – orig. accused should have been convicted under Section 18 of the NDPS Act as the contraband article Opium is neither cannabis plant and cannabis nor a psychotropic substance and hence there is no question of framing charge under Section 22 of the Act or convicting the appellant – orig. accused under Section 20 (b) (ii) of the Act.

16. So far as sentence imposable upon the accused for commission of offence under Section 18 of the NDPS Act is concerned, according to him, it is proportionate to the guilt of the accused because the Opium recovered from him was weighing 900 grams and, therefore, no lenient view may be taken. He, therefore, urged to dismiss the appeal filed by the appellant – orig. accused No. 1.

17. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and

order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Hon'ble Supreme Court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned Special Judge (NDPS) & Fast Track Judge, Mehsana and considered the arguments advanced on behalf of the accused No. 1 and infirmities pressed, scrupulously with a view to find out as to whether the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has rightly recorded the order of conviction and sentence.

18. So far as framing of charge under Section 22 of the NDPS Act is concerned, according to this Court, there is a lot of substance and force in the submission made by Mrs. Shilpa Shah. Section 22 deals with punishment for contravention in relation

to psychotropic substances The word “psychotropic substance” is defined in Sub-section (xxiii) in Section 2 of the NDPS Act. As per the said definition, psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. A perusal of the schedule shows that Opium is not included therein. Therefore, framing of charge for commission of offense under Section 22 of the NDPS Act itself is contrary to the provision of the NDPS Act from the inception. Therefore, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has altered the charge by taking recourse to the provisions of the Code of Criminal Procedure and considered the case of the appellant – orig. accused No. 1 under Section 20 (b) (ii) of the NDPS Act. This is also not correct as Section 20 of the Act deals with punishment for contravention in relation to Cannabis plant and Cannabis whereas contraband article found was Opium to which Section 18 of the Act

applies.

19. There is no manner of doubt that a person indulging in the business of narcotic drugs is a menace to the society. He does not only break the economy of the country but also substantially causes damage to the youth of the country and also deteriorates their health and, therefore, they become useless for society and the country. Therefore, to combat illicit drug traffic and drug abuse, both at the national and international levels, stringent punishment is provided under the NDPS Act. However, the parliament in its wisdom thought it fit that there should be rationalized sentencing structure depending upon the quantity of the contraband article i.e., narcotic substance recovered from the accused and, therefore, the parliament has enacted Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001.

20. The appellant - accused is treated as convicted for commission of offense punishable under Section 18

of the NDPS Act. Section 18 before and after amendment reads as under :-

Before Amendment of 2001 :-

"18. Punishment for contravention in relation to opium poppy and opium.

Whoever, in contravention of any provision of this Act, or any rule or order made or condition of license granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

After Amendment of 2001

"18. Punishment for contravention in relation to Opium poppy and opium.

Whoever, in contravention of any provision of this Act or any rule or order made or condition of license granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(a) Where such contravention involves small quantity, with rigorous imprisonment for term which

may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) Where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees;

(c) In any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees."

21. As per the table specifying small quantity and commercial quantity, so far as Opium is concerned, small quantity specified is 25 grams whereas commercial quantity specified is 2.5 Kg. There is no manner of doubt that the quantity recovered from the possession of the accused was weighing 900 grams and thus the contraband article recovered from the accused was less than commercial quantity but greater than small quantity and therefore, as per the amended provision, RI could have been extended upto ten years and fine could have been extended to Rs. 1 lakh.

22. In the instant case, the learned Special Judge

(NDPS) & Fast Track Judge, Mehsana after hearing the accused and the learned advocates appearing for the parties on the question of quantum of punishment, imposed sentence of R.I. for ten years and fine of Rs.1,00,000 and in default thereof, S.I. for further period of 1 year. Therefore, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has imposed the maximum sentence in terms of the amended Provision of the NDPS Act which is obviously harsh and disproportionate to the contraband article Opium found from the possession of the accused.

23. It appears to us that while imposing the sentence, the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has not taken into consideration that though the offence was committed prior to the Amended NDPS Act 2001 came into force, the impugned judgment and order was passed when the said Act has come into force. Section 41 of the Amended NDPS Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of

Section-41 of the Amended NDPS Act, 2001 reads as under:-

*"**Sub Section-1 of Section-41** :– Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;*

Provided that nothing in this section shall apply to cases pending in appeal."

24. In the case of **Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609**, the interpretation of Section 41 (1) of the Amended NDPS Act, 2001 has come up for consideration before the Supreme Court. In the said case, the Supreme Court has observed that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and

provides that these categories of cases shall be disposed of in accordance with the provisions of the NDPS Act, 1985 as amended by the Amended NDPS Act, 2001. In other words, the benefit of the rationalized sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalized sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been

hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

25. So far as the offence registered against the accused is concerned, admittedly the incident had taken place on 10.07.2000. When the contraband article Opium was seized and at that time NDPS Act, 1985 was in force. The judgment was delivered on 19.06.2002 and the Amended NDPS Act, 2001 came into effect from 2.10.2001. Admittedly under the NDPS Act, 1985 punishment for commission of offence under Section 18 is not less than ten years but which may extend to 20 years and shall also

liable for fine which shall not be less than Rs.1 lakh which may extend to Rs. 2 Lacs whereas under the Amened NDPS Act, 2001, the commission of the offence under Section 18 falls in three categories as per the quantity of the contraband article seized :

(i) *Small quantity*

(ii) *Less than commercial quantity but more than the small quantity;*

(iii) *Commercial quantity.*

26.The contraband article Opium recovered from the accused was weighing 900 grams which is admittedly not a commercial quantity but it is also not a small quantity. The quantity seized from the accused is more than small quantity but less than commercial quantity. Therefore, the punishment is to be awarded as per clause 18 (c) of the Amended NDPS Act, 2001.

27.The learned Special Judge (NDPS) & Fast Track Judge, Mehsana has imposed minimum sentence under the unamended provisions of the NDPS Act,

1985 as it stood before the Amended NDPS Act, 2001 came into force with effect from 02.10.2001. Therefore, according to us, the punishment imposed by the learned Special Judge (NDPS) & Fast Track Judge, Mehsana under the NDPS Act, 1985 does not stand to scrutiny of this court as the learned Special Judge (NDPS) & Fast Track Judge, Mehsana has considered the minimum sentence of ten years as appropriate for commission of the offence under the unamended provisions of the NDPS Act, 1985 but in fact the learned Special Judge (NDPS) & Fast Track Judge, Mehsana ought to have imposed sentence under the Amended NDPS Act, 2001 wherein the punishment prescribed is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees by virtue of Clause (c) of Section 18, meaning thereby, the Court can impose rigorous imprisonment upto 10 years but there is no question of imposing minimum sentence of ten years in instance case. In this case, the appellant has undergone sentence of more than six and half years and, therefore, according to us,

looking to the facts and circumstances and considering the defence raised and mitigating factors pointed out by Ms. Shilpa Shah and further considering the fact that the appellant-accused No.1 has already undergone imprisonment for a period of more than six and half years, while maintaining the order of conviction, we are of the opinion that the sentence of R.I. for 10 years imposed on the appellant-accused under the NDPS Act, 1985 is required to be altered into sentence under the Amended NDPS Act, 2001 by imposing sentence of six years and fine of Rs. 50,000/- and in default thereof, to undergo S.I. for six months as the case is covered under clause (c) of Section 18 of the Amended NDPS Act, 2001.

28. Seen in the above context, the judgment and order of conviction recorded under Section 20 (b) (ii) of the NDPS Act, 1985 against the accused deserves to be quashed and conviction altered under Section 18 of the Act is maintained. However, the sentence

imposed on him is required to be reduced in terms of the final order as per this judgment.

29. For the foregoing reasons, the appeal succeeds in part and accordingly the appeal is partly allowed qua sentence only. The impugned judgment and order of conviction, convicting the accused for commission of offence punishable under Section 20 (b) (ii) of the NDPS Act, 1985 is altered into conviction under Section 18 (c) of the Amended NDPS Act, 2001 and accordingly, the appellant is sentenced to suffer RI for six years and to pay fine of Rs.50,000/- and in default of payment of fine, SI for six months.

30. Since the appellant has already undergone the sentence of more than six and half years, he is required to be released forthwith. The respondent – State of Gujarat and jail authorities are hereby directed to release the appellant forthwith, if his presence is not required in relation to any other offence.

31.The appeal is accordingly partly allowed to the aforesaid extent.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya